

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A REVISION
OF A SHORELINE SUBSTANTIAL
DEVELOPMENT PERMIT ISSUED BY
THE CITY OF WESTPORT TO
KENNETH and JUDY BOWE,

GRACE LUNSTAD,

Appellant,

v.

CITY OF WESTPORT and
KENNETH and JUDY BOWE,

Respondents.

SHB No. 83-51

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the request for review of a revision to a shoreline substantial development permit, came on for hearing before the Shorelines Hearings Board; Gayle Rothrock, Chairman, David Akana, Lawyer Member, Lawrence J. Faulk, Vice Chairman, Rodney Kerslake, Nancy Burnett, Members, convened at Lacey, Washington, on February 22, 1984. Administrative Law Judge William A. Harrison presided.

Appellant appeared by her attorney, R. Patrick McGreevey.

Respondent City of Westport appeared by William E. Morgan, City Attorney. Respondents Kenneth and Judy Bowe appeared by their attorney Robert Ratcliffe. Reporter Bibi Carter recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard and exhibits examined, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

This matter is a sequel to our earlier decisions in Whittle v. Westport and Bowe, SHB No. 81-10 (1981) and Lunstad and Whittle v. Westport and Bowe, SHB No. 82-2 (1982). In the former, we vacated and remanded a shoreline substantial development permit issued by Westport to Mr. Bowe. In the latter, following reissuance of the permit, we affirmed. The permit, as affirmed, allowed Mr. Bowe to place fill upland of the mean high-tide line in the City of Westport. The purpose of the fill was to facilitate construction of a single-family residence which would be the Bowe home.

II

Since our affirmance of the permit (SHB No. 82-2, 1982) the following has occurred:

1. Mrs. Lunstad and Mrs. Whittle petitioned the Thurston County Superior Court for judicial review of our affirmance in SHB No. 82-2, which petition is pending there now, and

2. The United States, Department of the Army, Corps of Engineers

1 (Corps) directed Mr. Bowe to trim back the north and east edges of the
2 fill. Mr. Bowe obtained permission from the Corps to deposit the
3 removed material along the west edge of the fill. This directive was
4 made pursuant to the federal law governing the Corps' program under
5 Section 404 of the Federal Water Pollution Control Act, 33 USC Section
6 1344. That law is different and distinct from the Shoreline
7 Management Act, chapter 90.58 RCW, and Westport Shoreline Master
8 Program under which we affirmed the fill permit. The apparent purpose
9 of the Corps' directive was to mitigate the fill's effect.

10 III

11 To conform his state shoreline permit with the Corps' requirement,
12 Mr. Bowe applied to the City of Westport (Westport) for a revision of
13 his state shoreline permit to allow trimming back the fill on the
14 north and east borders and redepositing it along the west border.
15 Westport granted the revision on August 12, 1983, in the form
16 requested by Mr. Bowe. The diagram attached to the revision shows
17 that an increase in lot coverage of approximately 66 percent was
18 authorized.

19 IV

20 Westport did not send a copy or notice of its permit revision to
21 Mrs. Lunstad although she had earlier requested of Westport, in
22 writing, that she be informed of any action taken on Bowe's
23 application for the original shoreline permit. Mrs. Lunstad lives
24 across the street from the subject fill.

25 V

26 On September 15, 1983, Mrs. Lunstad filed with this Board a
27

1 request for review of Westport's revision to Mr. Bowe's permit. The
2 Department of Ecology refused to certify the request for review; the
3 Attorney General failed to certify the request for review.
4 Consequently, it was dismissed by our Order of October 17, 1983.
5 Mrs. Lunstad petitioned the Thurston County Superior Court for
6 judicial review of our dismissal on November 15, 1983.

7 VI

8 On October 29, 1983, Mr. Bowe trimmed back the north and east
9 borders of the fill pursuant to the Corps' directive and his revised
10 state shoreline permit. Finding that the volume of fill removed was
11 insufficient to expand the western border significantly, Mr. Bowe
12 elected instead to relocate all the removed material on top of the
13 existing fill. The depth of the resulting fill was not materially
14 greater than that which existed before, and the lot coverage of the
15 fill was actually reduced relative to that which existed before.
16 Mr. Bowe stipulates that this is the only action he will take under
17 the permit revision granted by Westport, and that he does not wish to
18 fill further to the boundaries of the 66 percent larger fill area
19 authorized by the revision. The Corps has indicated that Mr. Bowe's
20 action was in compliance with its directive and considers the matter
21 of the entire fill to be closed.

22 V

23 Appellant, Mrs. Lunstad, has not shown that the use authorized by
24 the original permit is changed by Westport's revision.

VI

On November 15, 1983, Mrs. Lunstad filed with this Board another request for review of Westport's revision to Mr. Bowe's permit. This request was certified by the Department of Ecology and Attorney General, and is the matter before us now.

VII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

No party disputes the Board's jurisdiction in this matter.

II

Westport violated the rule governing permit revisions, Department of Ecology WAC 173-14-064(4), by not submitting a notice of revision approval to Mrs. Lunstad, a person who notified local government (Westport) of her desire to receive a copy of the action on a shoreline permit application. This failure of notice after the fact is distinguishable from the failure to provide notice before local government's decision as in Save Flounder Bay v. Mousel and Anacortes, SHB No. 81-15 (1981) cited by appellant, which is inapposite. This failure of after-the-fact notice does not render the permit revision null and void as appellant contends.

III

The sole substantive issue with regard to revision of a shoreline permit is whether the revision is within the scope and intent of the

1 original permit. WAC 173-14-064(5). The revision granted by Westport
2 violates WAC 173-14-064(2)(b) in that it authorized an increase in lot
3 coverage of more than 10 percent.

4 IV

5 Appellant has not shown that a revision to Mr. Bowe's shoreline
6 permit authorizing only the fill removal and redistribution undertaken
7 on October 29, 1983, would be beyond the scope and intent of the
8 original permit. Such a revision has not been shown to involve an
9 increase in lot coverage of more than 10 percent or to be otherwise in
10 conflict with WAC 173-14-064 governing revisions. Such a narrower
11 revision could be granted by Westport. Westport should send notice of
12 any such revision to persons who have requested to be informed of
13 action on Bowe's application.

14 V

15 In reviewing and concluding upon the terms of Westport's permit
16 revision we do not have before us the propriety of commencing
17 construction under it while the permit is on appeal before the
18 Superior Court. We do not condone commencing construction before all
19 review proceedings are terminated. See RCW 90.58.140(5).

20 VI

21 We have reviewed the other contentions of appellant and find them
22 to be without merit.

23 VI

24 Any Finding of Fact which should be deemed a Conclusion of Law is
25 hereby adopted as such.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
SHB No. 83-51

From these Conclusions of Law the Board enters this

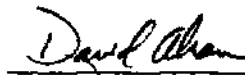
ORDER

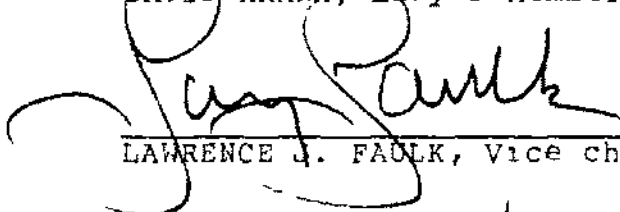
The shoreline permit revision granted by the City of Westport to Kenneth Bowe is vacated, and the matter remanded to the City of Westport for reissuance of a revision consistent with Conclusion of Law IV, above.


DONE at Lacey, Washington, this 13th day of March, 1984.

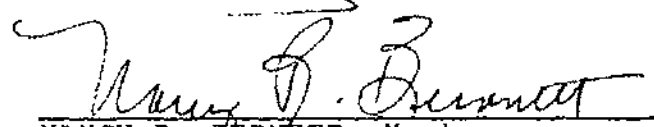
SHORELINES HEARINGS BOARD


GAYLE ROTHROCK, Chairman


DAVID ARANA, Lawyer Member


LAWRENCE J. FAULK, Vice chairman


RODNEY KERSLAKE, Member


NANCY R. BURNETT, Member


WILLIAM A. HARRISON
Administrative Law Judge

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
SHB No. 83-51